FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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November 17, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-267
Petitioner	:	A.C. No. 15-19097-130857
	:	
v.	:	
	:	
PROCESS ENERGY,	:	Mine #1
Respondent	:	

DECISION

Appearances: Jennifer D. Booth, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, Tennessee,
for the Petitioner;
Carol Ann Marunich, Esq., Dinsmore & Shohl LLP,
Morgantown, West Virginia, for the Respondent.

Before: Judge Feldman

This single citation civil penalty proceeding concerns a Petition for Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), as amended, 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Process Energy. The petition seeks to impose a civil penalty of $585.00 for an alleged violation of the Secretary's mandatory safety standard in 30 C.F.R. § 77.400(a) governing guarding of mechanical equipment located at surface locations of underground coal mines.

At the time Citation No. 6655616 was issued on September 17, 2007, Process Energy was developing its No. 1 Mine located in Pike County, Kentucky. The cited condition concerns a four inch piece of steel welded to, and protruding from, an unguarded side discharge roller shaft. (Gov. Ex. 1). The steel appendage serves to engage a clutch to prevent the backwards slippage of the belt in the event of a loss of power. The unguarded shaft is not located on the travel side of the belt structure. Rather, it is located on the offside of the conveyor, in close proximity to the highwall, an area infrequently traveled and only accessible by a crossover constructed over the beltline. The cited violative condition was designated as significant and substantial (S&S) in

nature.[1] At trial, counsel for Process Energy stipulated to the fact of the violation. (Tr. 81). The remaining issues are whether the violation was properly designated as significant and substantial, and the appropriate civil penalty to be imposed.

This matter was heard on September 9, 2008, in Pikeville, Kentucky. At the culmination of the hearing I advised the parties that I would defer my ruling pending post-hearing briefs, or, issue a bench decision if the parties elected to waive their right to file post-hearing briefs. If the parties waived the filing of briefs in favor of a bench decision, they would be required to submit written stipulations of fact based on the uncontested testimony. The parties elected to submit written stipulations of fact and to waive post-hearing briefs. (Tr. 157-59). The parties' stipulations of fact was received on November 7, 2008, at which time the record was closed. This decision contains a summary of the stipulated facts, as well as the edited bench decision that is supplemented with pertinent case law.

I. Stipulations of Fact

On September 17, 2007, Process Energy was in the process of developing a slope on an eight percent grade for the descent into the coal mine. Their intent was to descend inby 2,000 feet. Process Energy had advanced approximately 1,500 feet at the time the citation was issued. Advancement underground was accomplished by transporting the extracted rock and debris on a belt conveyor to the surface.

On the surface, at the end of the beltline was the discharge roller in question. On the offside of the belt drive was a starter box that was located approximately nine to ten feet from the belt, and approximately 12 to 15 feet from the discharge draft. A highwall was next to the offside of the belt. There was a crossover from the travelway side of the belt that miners used to traverse over the belt to access the starter box area. (Gov. Ex. 4).

The unguarded discharge roller was suspended five to seven feet above the ground on the offside of the belt. There was a truck dump located at the top of the slope approximately 20 to 30 feet from the discharge roller. (Gov. Ex. 4). The extracted material that was carried from underground up the slope on the conveyor accumulated as it fell off of the belt to the ground at the discharge roller. The accumulated debris was gathered and removed by a front-end loader operator, using the highwall as a backstop to load the rock into the shovel. The material was loaded in dump trucks for removal from the site.

[1] Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

The only disagreement between the parties is the distance from the discharge roller to the highwall. The issuing Mine Safety and Health Administration (MSHA) Inspector recalled that the distance was approximately three to four feet. Process Energy's chief electrician testified the clearance between the highwall and the discharge roller was approximately one foot. The electrician recalled that he had to lie on the belt to access the roller to install a guard because of a lack of clearance between the belt structure and the highwall. What is not in dispute is that the relatively narrow area between the cited discharge roller and the highwall was not a travelway, or otherwise used by miners to walk to the truck dump or any other destination.

II. Pertinent Penalty Criteria

The bench decision applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In determining the appropriate civil penalty, section 110(i) provides, in pertinent part:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The parties stipulated that Process Energy is a mine operator that is subject to the jurisdiction of the Mine Act. It is not contended that the proposed penalty will affect Process Energy's ongoing business operations, and Process Energy promptly abated the cited violation. It has neither been contended nor shown that Process Energy's history of violations is an aggravating factor in determining the appropriate civil penalty to be assessed in this proceeding. The remaining civil penalty criteria regarding gravity and negligence will be addressed in the disposition of this case.

III. Relevant Case Law

Significant and Substantial

The bench decision applied the Commission's standards with respect to what constitutes a significant and substantial (S&S) violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, *supra*, at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4. *See also Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, the Commission explained its *Mathies* criteria as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984).

7 FMSHRC 1125, 1129 (August 1985) (emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

IV. Further Findings and Conclusions

The following is a summary of the bench decision, with editorial additions including supporting case law, that was issued upon completion of the relevant testimony :

Process Energy has stipulated to the fact of the violation. Thus, the remaining issues are whether the cited guarding violation was properly designated as significant and substantial and the appropriate civil penalty. The Secretary proposes a civil penalty of $585.00 for Citation No. 6655616. Determining the appropriate civil penalty requires determining the degrees of gravity and negligence associated with the subject violation.

Section 77.400(a) states that: "Gears; sprockets; chains; drive heads; tail; and takeup pulleys; flywheels; couplings; shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded." 30 C.F.R. § 77.400(a).

The controlling case on guarding violations is the Commission's decision in *Thompson Brothers Coal Co.*, 6 FMSHRC 2094 (Sept. 1984). The Commission stated:

> We find that the most logical construction of the [guarding] standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. *See, e.g., Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, *e.g.*, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

6 FMSHRC at 2097.

Resolving the issue of significant and substantial requires determining whether it is reasonably likely that this unguarded shaft **will result in an event**, *i.e.*, inadvertent contact, resulting in injuries of a serious nature. Undoubtedly, accidental contact could reasonably cause serious injury or death. However, the dispositive issue is the likelihood of such inadvertent contact. There is a positive correlation between the likelihood of contact and the frequency of exposure to unguarded pinch points. As the Commission noted in *Thompson*, such factors as accessability, ingress and egress, and work duties are relevant considerations.

Regarding accessibility, the area where the unguarded shaft is located is only accessible by traversing a crossover. In addition, the cited shaft is on the offside of the belt rather than on the travelway side. Finally, the unguarded shaft is located in a corner where the highwall's close proximity to the belt structure precludes travel. (Gov. Ex. 4).

With regard to ingress and egress, I credit the testimony of Process Energy's chief electrician that the clearance between the shaft and the highwall was only one foot, rather than the distance of three to four feet recalled by the issuing mine inspector. I reach this conclusion because of the chief electrician's familiarity with the mine conditions, and because the inspector did not make any contemporaneous notations of the clearance distance in his inspection notes or in Citation No. 6655616. In addition, the narrow clearance between the shaft and the highwall prevents foot travel that would pose a significant risk of exposure to contact.

Finally, the nature of the front end loader operator's work duties, using a loader to remove debris from under a belt structure that is suspended as high as seven feet above the ground, diminishes the likelihood of inadvertent contact. In short, consistent with *Thompson*, the Secretary has failed to satisfy her burden of demonstrating, by a preponderance of the evidence, that the hazard posed by this condition creates a reasonable likelihood that serious injury will occur. Thus, the S&S designation in Citation No. 6655616 shall be deleted.

Given the narrow clearance between the shaft and the highwall, the relative inaccessibility of the shaft due to its remote location and elevation, and the non-S&S nature of the violation, I find that the violation is attributable to no more than a moderate degree of negligence. The violation affects one person. The degree of gravity is moderate in that, although there is a potential for serious injury, an injury causing event is not reasonably likely. Consistent with the statutory civil penalty criteria, a penalty of $100.00 shall be assessed for Citation No. 6655616. (Tr. 159-68).

ORDER

In view of the above, **IT IS ORDERED** that Citation No. 6655616 **IS MODIFIED** by deleting the significant and substantial designation.

IT IS FURTHER ORDERED that Process Energy shall pay a civil penalty of $100.00 in satisfaction of Citation No. 6655616.

Payment is to be made to The Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, this civil penalty proceeding **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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